

Before the
Federal Communications Commission

In the Matter of:)	
Standardizing Program)	
Reporting Requirements for)	MB Docket No. 11-189
Broadcast Licensees)	

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, “Consumer Groups,” respectfully submit these reply comments in the above-referenced matter.¹ In our initial comments in this proceeding, we asked the Commission to require broadcasters to disclose accessibility information, including: (1) whether and if so, how, programming during composite reporting weeks has been captioned; (2) which programs were not captioned and why; and (3) the total number of complaints regarding the accessibility of emergency programming. Few other commenters address these issues. We take this opportunity, however, to respond to the small handful of industry representatives who suggest that the disclosure of accessibility information would be unnecessary, burdensome, or outside the scope of this proceeding. To the contrary, disclosure of accessibility information, which has long been an integral part of the Commission’s enhanced disclosure proceeding, would yield valuable data for setting accessibility policies that promote equal access to broadcast programming at minimal burden to broadcasters.

¹ Notice of Inquiry, Standardized Program Reporting Requirements for Broadcast Licensees, 76 Fed. Reg. 77,999, ¶¶ 31, 33 (released Nov. 14, 2011, published Dec. 15, 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1115/FCC-11-169A1.pdf [hereinafter *NOI*].

I. Accessibility disclosures are beneficial for both policymaking and rule compliance.

Several industry commenters, including the Radio Television Digital News Association (RTDNA), LeSEA Broadcasting Corporation (LeSEA), and several public television licensees (collectively, “Joint PTV”), argue that disclosing captioning information is unnecessary because the Commission already ensures broadcaster compliance with captioning requirements in other ways.² These assertions ignore both the important policymaking purposes of the proposed disclosures and the role that the disclosures would play in improving the ability of the Commission and the public to verify compliance with captioning and emergency accessibility rules.

As we noted in our initial comments, the accessibility disclosures proposed by the Public Interest Public Airwaves Coalition (“PIPAC”) would provide empirical evidence of the extent to which broadcasters (a) still utilize the inferior electronic newsroom technique (ENT) as a substitute for closed captions and (b) rely on the several categorical exemptions to the Commission’s closed captioning rules as a basis for delivering uncaptioned programming.³ A broadcaster’s

² See Comments of Radio Television Digital News Association (RTDNA), FCC Docket No. MB 11-189, at 28 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021857049> [hereinafter *RTDNA Comments*]; Joint Comments of Public Television (Joint PTV), FCC Docket No. MB 11-189, at 13 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021857023> [hereinafter *Joint PTV Comments*]; Comments of LeSEA Broadcasting Corporation (LeSEA), FCC Docket No. 11-189, at 5 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021756724> [hereinafter *LeSEA Comments*].

³ Comments of Telecommunications of the Deaf and Hard of Hearing (TDI), et al., FCC Docket No. MB 11-189, at 3-7 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021857027> [hereinafter *TDI*

delivery of programming without captions based on either ENT usage or a categorical exemption denies viewers who are deaf or hard of hearing equal access to that programming. Yet no mechanism exists for those viewers to complain to the broadcaster or the Commission about the programming's inaccessibility, because the delivery of uncaptioned programming is permitted under the Commission's rules regarding ENT and categorical exemptions.

We have asked the Commission to reevaluate the continuing viability of allowing ENT and affording broadcasters numerous categorical exemptions to the captioning rules. Data regarding the extent to which broadcasters still utilize ENT and categorical exemptions would provide a valuable empirical basis for the Commission's consideration of those issues. Moreover, industry disagreement over the amount of programming at issue in PIPAC's proposed accessibility disclosures serves to confirm that more data would be helpful to clarify the scope of broadcasters' continued usage of ENT and categorical exemptions. For example, LeSEA argues that a large amount of programming is still exempt from the captioning rules,⁴ while Joint PTV argues that virtually all programming is now closed captioned.⁵ The data needed to resolve this and related disagreements can be effectively and efficiently provided by broadcasters.

In addition to providing important data for policymaking, PIPAC's proposed disclosures would also help to ensure that broadcasters are proactively verifying their compliance with the captioning rules, rather than simply reacting to complaints. Filing a complaint is a time-consuming process, requiring a deaf

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⁴ LeSEA Comments, *supra* note 2, at 6.

⁵ Joint PTV Comments, *supra* note 2, at 13.

or hard of hearing viewer, who has already been denied access to the program he or she was trying to watch, to collect extensive information about the captioning problem and report it to a broadcaster or the Commission.⁶ Accordingly, the absence of complaints does not demonstrate that a broadcaster is compliant with the Commission's captioning rules; it may indicate merely that consumers have chosen not to file complaints despite the presence of captioning problems. Requiring broadcasters to affirmatively disclose information about how they caption their programs would enable advocates, consumers, and the Commission to evaluate compliance on a systemic level, relieving the burden on consumers of ensuring broadcaster compliance solely through complaints.

Moreover, the Commission has no way to systematically track consumer complaints about a broadcaster's failure to comply with captioning or emergency accessibility rules where consumers send the complaints directly to the broadcaster rather than to the Commission. Of course, viewers may file such complaints directly with the Commission.⁷ We agree with Joint PTV that the Commission should disclose non-personalized information about such complaints on a routine basis.⁸ But a viewer may also first reach out directly to a broadcaster to resolve his or her complaint.⁹ In that case, the broadcaster bears no affirmative duty to disclose the complaint to the Commission. If a broadcaster does not respond to the complaint, the consumer must go through the additional

⁶ 47 CFR § 79.1(g)(1). The FCC's Disability Access Complaint Form 2000C is available at https://esupport.fcc.gov/ccmsforms/form2000.action?form_type=2000C&request_locale=en.

⁷ 47 C.F.R. §§ 79.1(g)(1), 79.2(c).

⁸ Joint PTV Comments, *supra* note 2, at 15.

⁹ 47 C.F.R. § 79.1(g)(1) explicitly allows consumers to file captioning complaints with a broadcaster. While there is no corresponding allowance in 47 C.F.R. § 79.2 for emergency accessibility complaints, it is logical to expect that consumers may first reach out to broadcasters to resolve those complaints.

step of refiling the complaint with the Commission.¹⁰ If a rightfully frustrated consumer cannot or will not invest the time to refile the complaint, then the Commission and the public will not know that the complaint was filed in the first place. Accordingly, requiring disclosure of information about uncaptioned programming and emergency accessibility complaints would provide the Commission and the public with valuable information about potential compliance problems of which only broadcasters are currently aware.¹¹

II. Accessibility reporting requirements are not overly burdensome.

Industry commenters complain that requiring disclosure of captioning information would be overly burdensome for broadcasters.¹² These complaints ignore that broadcasters must already maintain information about if and how their programming is captioned to respond to captioning complaints and to verify compliance with the captioning rules for the purpose of their license renewals.

First, 47 C.F.R. § 79.1(g)(5) explicitly obligates broadcasters to “provide the Commission with sufficient records and documentation to demonstrate . . .

¹⁰ Refiling is explicitly required for captioning complaints under 47 C.F.R. § 79.1(g)(4) and implicitly for emergency accessibility complaints under 47 C.F.R. § 79.2(c).

¹¹ The “major transition” in the Commission’s emergency alert system should not pose a barrier to identifying and rectifying existing problems. *See* Joint PTV Comments, *supra* note 2, at 15.

¹² Comments of National Association of Broadcasters (NAB), FCC Docket No. MB 11-189, at 28-29 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021857059> [hereinafter *NAB Comments*]; Comments of LIN Television Corporation, FCC Docket No. MB 11-189, at 4 (Jan. 27, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021856842> [hereinafter *LIN Comments*]; RTDNA Comments, *supra* note 2, at 28-29; LeSEA Comments, *supra* note 2, at 6; Joint PTV Comments, *supra* note 2, at 13.

compliance with the Commission's [closed captioning] rules" in response to any consumer complaint about a captioning problem. Although this requirement does not technically require broadcasters to maintain comprehensive information about why particular programming is not captioned,¹³ it requires broadcasters to make such information available to the Commission immediately in the case of a complaint. It is highly possible that the Commission will receive a complaint about a program that is missing captions because, unbeknownst to the viewer, the program is subject to one of the Commission's categorical exemptions.

Accordingly, it behooves a broadcaster to have detailed records of exempted programs on hand so it can quickly demonstrate to the Commission that complaints about those programs are unwarranted. There is little additional burden in presenting that very same information to the Commission on a quarterly basis as part of a broadcaster's required reporting disclosures.¹⁴

¹³ See LeSEA Comments, *supra* note 2, at 6. Contrary to LeSEA's assertion, the Commission's statement in its 1998 Order declining to adopt recordkeeping requirements referred to general recordkeeping on all of a broadcaster's captioning-related activities, and not the limited maintenance of captioning data on exempt and composite week programming in PIPAC's proposal. See Order on Reconsideration, Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 19973, ¶ 118 (1998). The Commission also noted that it could request captioning records as part of an audit of a broadcaster. *Id.*

¹⁴ LeSEA complains that it would be "incredibly burdensome" for licensees to report the nature of the exemption for each program that is exempt given the number of categorical exemptions in the Commission's rules. LeSEA Comments, *supra* note 2, at 6. But the Commission promulgated these categorical exemptions specifically to *reduce* the burden on broadcasters of captioning certain types of programming. See Report and Order, Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 3272, ¶ 15 (1997). If broadcasters find it overly burdensome to keep track of the programming subject to the thirteen exemptions in the Commission's rules, they can – and should – simply ensure that their programming is captioned instead. Moreover, LeSEA's complaint is again contradicted by the observation of Joint PTV that there is very little exempt programming. See Joint PTV Comments, *supra* note 2, at 13.

Moreover, as we noted in our initial comments, communicating better information to consumers about programming subject to exemptions should result in *fewer* misdirected complaints about uncaptioned programming.¹⁵

Additionally, broadcasters must affirm during each renewal of their license that they have not violated the Communications Act of 1934 or the Commission's rules or regulations, including those related to closed captioning, during their previous license term.¹⁶ A broadcaster plainly violates 47 C.F.R. § 79.1 by failing to provide closed captioning for nonexempt programming. Accordingly, by seeking a license renewal, a broadcaster necessarily affirms that any program it aired without captions qualified for an exemption. At some point, the broadcaster must have had information regarding the reason the program was not captioned to know that it could air the program without violating the Commission's rules. Again, there should be little additional burden in maintaining and presenting that very same information to the Commission on a quarterly basis.

III. Accessibility is an essential part of broadcasters' public interest obligations.

Finally, some commenters, including the National Association of Broadcasters (NAB), assert that it is inappropriate to address captioning issues in the context of this proceeding.¹⁷ To the contrary, the Commission notes that the purpose of this proceeding is to provide the public with more information about how local broadcasters serve their communities and to make broadcasters more accountable to the public. This proceeding is inextricably intertwined with the

¹⁵ TDI Comments, *supra* note 3, at 6-7; *contra* LeSEA Comments, *supra* note 2, at 6.

¹⁶ See FCC Form 303-S, §2 Question 4, *available at* <http://transition.fcc.gov/Forms/Form303-S/303s.pdf>

¹⁷ NAB Comments, *supra* note 12, at 29; LeSEA Comments, *supra* note 2, at 6.

Commission's 2007 proceeding on enhanced disclosure, where the Commission addressed the importance of accessibility to broadcasters' public interest obligations by seeking to require broadcasters to disclose substantially more information than is required here.¹⁸

To the extent that commenters believe that providing accessible programming is not an important part of broadcasters' public interest obligations, we strongly disagree. There are approximately 50 million Americans who are deaf or hard of hearing, all of whom are very much a part of the communities that broadcast licensees are obliged to serve. Every television program aired without captions is one that viewers who are deaf or hard of hearing cannot fully experience, and equal access to video programming is a core goal of both the Telecommunications Act of 1996 and the Twenty-First Century and Video Accessibility Act. Because acquiring more accessibility information would further this goal and help realize efforts to bring video programming to all Americans on equal terms, we urge the Commission to adopt the proposed disclosure requirements.

¹⁸ For example, the previous Form 355 adopted by the Commission required broadcasters to disclose captioning information about *all* programming, not just exempted and composite week programming. Report and Order, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 FCC Rcd. 1274, 1293, ¶ 46 (2007).

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